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No. 346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

CARLO MILLA GIACONA, *Petitioner*

v.

UNITED STATES OF AMERICA

REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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1.

Finley's First Intrusion Upon The Mecca Was Not Only A Search, But Was A Prohibited, Unlawful Search

In its brief opposing the petition for a writ of certiorari, the government does not deny that:

(a) if Finley's first search was illegal, the evidence then obtained was reversible error regardless of the weight of any other evidence (Pet. 9-10) or that

(b) if Finley's first search was illegal, the search warrant based upon it was void (Pet. 10-11), or that

(c) if Finley's first search was illegal, petitioner's subsequent arrest and the second search were both illegal (Pet. 10-11).

The government makes no effort to support either its prosecutor's argument that probable cause alone can justify a search of permanent premises without a warrant (R. 224-225) or the position of the Court of Appeals that a search without a warrant is lawful if described as an "inspection" for evidence to be used as grounds for a warrant (R. 276).

Under these circumstances, the Court should reverse this conviction on the pleadings alone, because there is no merit in the government's suggestion that a citizen is "secure" against unreasonable searches while a federal agent is creeping under his place of business at night, alone and without lawful authority.

Although the "argument" portion of the government's brief (and the government's formulation of the "question presented") presses for the view that Finley merely ". . . looked under the Mecca Drive-in . . . and found a bag of marihuana . . . " (Br. 5), the Solicitor General's characteristic candor impels him to admit, in the "statement" portion of his brief, that Finley "crawled" (Br. 3) under the building. (Finley *had* to crawl, of course, because the Mecca is only two or two and a half feet above the ground (R. 39), an elevation which does not permit casual entry or observation.)

The distinction is important.

The evidence in this case was not secured because an investigator saw something suspicious in broad daylight, which was the case in every opinion cited in the government's brief. Here, the evidence is supposed to have been found only as the result of carefully laid plans which would have permitted the federal agents to steal quietly away in the darkness if they were embarrassed by the appearance of any person who might contradict their version of the facts.

This Court has not specifically approved the action of federal agents who peer into private premises from a vantage point secured illegally (see the concurring opinion of Mr. Justice Jackson in *McDonald v. United States*, 335 U.S. 451, 457-461), and even the Fifth Circuit feels that federal agents who peek through a man's window violate "his 'right to be let alone' as guaranteed by the Fourth Amendment." *Brock v. United States*, 223 F. 2d 681, 685.

To argue that the under side of a building "is simply one of its outside walls" (Br. 6), is to ignore such realistic distinctions as the fact that this particular "outside wall" was not visible except to someone who was already physically upon the premises. To permit Finley to reach "up underneath the floor of the Mecca" (R. 40) is to allow other officers to reach through basement windows in areas of the country in which ground moisture is low enough to permit the economical construction of basements, in contrast to the Texas Gulf plains where slightly elevated construction is often necessary.

Approval of Finley's technique will deny constitutional protection to an area from which most householders would properly desire the exclusion of official intruders and will

raise new and perplexing questions as to the extent of enclosure necessary to insure privacy for a commonly-utilized storage area.

> "The direct operation or literal meaning of the words used (in the Constitution) do not measure the purpose or scope of its provisions." *United States v. Lefkowitz*, 285 U.S. 452, 467.

To exclude the area in question from the purview of the Fourth Amendment is to create a strained exception to constitutitonal provisions which " . . . should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well intentioned but mistakenly over-zealous executive officers." *Gouled v. United States*, 255 U.S. 298, 304.

2.

Finley Himself Did Not Think That His Information Established Probable Cause

Both the Court of Appeals and the government have intimated (R. 264, Br. 2) in footnotes:

(a) that Finley's "information" might alone have authorized petitioner's ultimate arrest, and a second search incident to that arrest, without regard to knowledge gained by the first search, and

(b) that the government was prevented from proving this "information" only because petitioner's lawyer objected (R. 98) to its admissibility.

This position ignores the fact that the defense gave Finley a straightforward opportunity to assert that his actions were based upon his "information", rather than his illegal search, and that Finley said "it was not". (R. 84) because of his "information" that he knew marihuana was under the Mecca, but "because I had gone up there and gotten a sample of it." (R. 83)

Having clearly disclaimed acting on the basis of his "information," Finley made the "information" immaterial. His failure to present the "information" to a magistrate speaks louder than words which he might now utter to justify his conduct, and shows that he himself did not regard the "information" as proving probable cause until it was fortified by the illegal search.

3.

The Government Offer To Prove Finley's Information Was Nothing More Than An Improper Attempt To Prejudice The Jury

The suggestion that the defense somehow prevented the prosecution from proving probable cause for petitioner's arrest also ignores the government's actual trial tactics.

This petitioner does not argue that evidence once acquired illegally is thereafter inviolate, even though properly discovered later through an "independent source." Certainly *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, is to the contrary. The most respectable authority, however, holds that if the defense demonstrates that evidence has been illegally obtained, the government must prove that its unlawful acts have not tainted any

later seizure of the same evidence because, " . . . it is unfair to throw upon the innocent party the duty of unravelling the skein which the guilty party has snarled." *United States v. Goldstein*, 120 F. 2d 485, 488, affirmed without decision of this question as *Goldstein v. United States*, 316 U.S. 114; *United States v. Coplon*, 185 F. 2d 629, 636. See *Nardone v. United States*, 308 U.S. 338, 341.

It cannot be questioned that factual issues involving the admissibility of evidence seized during a search are for the trial judge to settle, not the jury. *Steele v. United States*, 267 U.S. 505, 511; *Ford v. United States*, 273 U.S. 593, 605. Nothwithstanding this settled doctrine, when the U. S. Attorney had a chance to discuss probable cause outside the jury's hearing it was his position that:

> "We are willing to go into the case of probable cause; however, we do not feel that is necessary." (R. 73)

The only time the U. S. Attorney actually offered to prove Finley's "information" was when he said, in the presence of the jury:

> "We feel that Mr. Scott has opened the door on this and we want the witness to give the jury the complete picture now that it has been gone into." (R. 98)

This conduct may well have been prejudicial error in itself, because it dared the defense, in the jurors' presence, to permit the jury to consider hearsay which obviously was not material to any issue within the province of the jury. See *Nalls v. United States*, 240 F. 2d 707, 710. Such strategy certainly violates the spirit of Canon 22 of the Canons of Ethics of the American Bar Association, which provides in pertinent part:

> " . . . Neither should (a lawyer) introduce into an argument, addressed to the court, remarks or statements intended to influence the jury or bystanders."

This Court should not reward such tactics by presuming that probable cause for an arrest might be found in unrevealed "information" which did not persuade Finley to secure a warrant, as required by the Fourth Amendment, and which the government chose not to offer to the trial judge outside the jury's hearing, as required by proper trial practice.

Less than four months ago, both the majority and the dissenting members of this Court agreed that probable cause alone is no substitute for a search warrant. *Jones v. United States*, 357 U.S. 493, 78 S. Ct. 1253, 1256, 1259, 2 L. Ed. 2d 1514, 1518, 1521. Nevertheless, the government argued on the trial of this petitioner's case that:

> "The Court has heard some evidence that information was obtained by the officers in advance, which satisfies the requirement, we say, of probable cause, which is the only cause for a search, without a warrant." (R. 224-225)

This misconception of the law was compounded by the Fifth Circuit's conclusion that an illegal search may buttress gossip about a defendant's guilt because:

> " . . . after that information had been verified by Finley's personal inspection, it constituted 'probable cause.'" (R. 277)

The principles upon which this conviction was affirmed are at war with two hundred years of constitutional precedent. The judgment below pleads for further review.

Respectfully submitted,

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Certificate of Service

I certify that I mailed five copies of this brief to the Solicitor General, Department of Justice, Washington 25, D. C., air mail postage prepaid, on October 13, 1958.

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